FILE COPY

IN THE

Supreme Court of the United States

59

PETITION FOR WRIT OF CERTIORARI

SUBJECT INDEX

PAGE

A:

Opinion 2

B.

Jurisdiction 2

C.

The questions presented for review 2

D.

Constitutional provisions and statutes involved 4

E.

Statement of the case 6

F.

Argument amplifying the reasons relied on for the allowance of the writ 10

I.

Due process was violated by the admission of hearsay evidence 10

II.

Due process was violated by the limitation of cross-examination of the only government witness 11

III.

The Court of Appeals construction of "value" as used in 18 U. S. C., Section 641, decides an important question of federal law which has not been but should be settled by this court 16

IV.

The Court of Appeals decision requires a re-examination by this court of the rule of concurrency because of conflict with decisions of another Court of Appeals and the importance of the question 26

Conclusion 32

TABLE OF AUTHORITIES CITED

CASES — PAGE

Abbott v. United States, 239 F. 2d 310 ..... 20, 21, 23

Ballew v. United States, 160 U. S. 187 28

Bell v. United States, 349 U. S. 81, 75 S. Ct. 620, 99 L. Ed. 905 ..... 25, 30

Buford v. United States, 272 F. 2d 483 31

Chin Bick Wah v. United States, 245 F. 2d 274 31

Claassen v. United States, 142 U. S. 140 ..... 26, 27, 28

DiCanio v. United States, 355 U. S. 874 ..... 28, 30

Fisher v. United States, 231 F. 2d 99 13

Gordon v. United States, 164 F. 2d 855 ..... 21, 22

Husten v. United States, 95 F. 2d 168 22

Kowalchuck v. United States, 176 F. 2d 873 22

Lawn v. United States, 355 U. S. 339, 78 S. Ct. 311, 2 L. Ed. 321 31

Lunceford v. United States, 200 F. 2d 237 14

Morrissette v. United States, 342 U. S. 246, 96 L. Ed. 288, 72 S. Ct. 240, rvrs'g 187 F. 2d 427 ..... 19, 25

O'Malley v. United States, 227 F. 2d 332 ..... 22, 23

Pierce v. United States, 252 U. S. 239 27

Putnam v. United States, 162 U. S. 687 ..... 27, 28, 30

Robinson v. United States, 30 F. 2d 25 ..... 28, 30

Robinson v. United States, 262 F. 2d 645 31

Sawyer v. Barczak, 76 S. Ct. 1025, 351 U. S. 966, 100 L. Ed. 1486 10

Sawyer's Petition, In re, 229 F. 2d 805 10

Singer v Ind. Management Corp., 116 Cal. App. 2d 85 19

Snyder v. United States, 291 U. S. 106, 54 S. Ct. 330, 78 L. Ed. 674 11

PAGE

Stein v. United States, 263 F. 2d 579 31

Stern v. United States, 204 F. 2d 647 21

Torres v. United States, 270 F. 2d 252, cert. den. 4 L. Ed. 2d 741 18

United States v. Augustine, 189 F. 2d 587 13

United States v. Crawford, 195 F. 2d 472 22

United States v. DiCanio, 245 F. 2d 713 ..... 28, 30

United States v. Garvey, 150 F. 2d 767 21

United States v. Hines, ... Cal. App. 2d 256, ... F. 2d 561 ..... 26, 27, 28, 29, 30, 31, 32

Yates v. United States, 356 U. S. 363, 252 F. 2d 568 ..... 28, 29, 30, 31

STATUTES

United States Code, Title 18, Sec. 201 ..... 1, 4, 26

United States Code, Title 18, Sec. 641 ..... 1, 5, 16, 17, 18, 19, 20, 23, 26

United States Code, Title 18, Sec. 659 ..... 17, 18

United States Code, Title 18, Sec. 2311 ..... 16, 17, 18, 20

United States Code, Title 18, Sec. 2314 20

United States Code, Title 18, Sec. 3231 2

United States Code, Title 28, Sec. 1254 2

United States Constitution, Fifth Amendment 4, 30

United States Constitution, Sixth Amendment 4

United States Constitution, Eighth Amendment 22, 30

United States Constitution, Fourteenth Amendment 13

IN THE

Supreme Court of the United States

OCTOBER TERM, 1960

No. .....

ALEXANDER L. FULKS,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI.

Petitioner Alexander L. Fulks respectfully prays for a writ of certiorari to the United States Court of Appeals for the Ninth Circuit to review its judgment in the above entitled cause, affirming the conviction of petitioner on one count of theft of government property of a value of more than $100.00 (18 U. S. C. 641) and two counts of bribery of a government employee (18 U. S. C. 201) for which he was sentenced to three years on the theft count concurrently with three years on each of the two bribery counts and a $5,000.00 fine on the theft count, after trial without a jury in the United States District Court for the Northern District of California, Northern Division.

A.
OPINION.

The opinion was filed October 10, 1960. It has not yet been published. A copy is appended. [Vol. III, pp. 3-6.]*

B.
JURISDICTION.

The grounds on which the jurisdiction of this Court is invoked are as follows:

(i) The date of the judgment sought to be reviewed is October 10, 1960. It was entered the same date. [Vol. III, pp. 3-7.]

(ii) Petitioner filed a petition for rehearing on November 7, 1960. It was denied without opinion on November 21, 1960. [Vol. III, p. 8.]

(iii)(a) The statutory provision believed to confer on this Court jurisdiction to review the judgment in question by writ of certiorari is 28 U. S. C. Section 1254.

(b) The basis for federal jurisdiction in the court of first instance is 18 U. S. C. Section 3231.

C.
THE QUESTIONS PRESENTED FOR REVIEW.

1. Where at the trial of petitioner and one Miller jointly charged with bribery of a government employee and in the same transaction theft of government property, written and oral incriminating hearsay conversa-

*The record is in three volumes. Volume I, pages 1 through 110, is labeled Transcript of Record. Volume II, pages 3 through 312, is labeled Reporter's Transcript and Volume III comprises pages 1 through 9. Citations to the record will be by volume number, page and, if needed, line number.

tion and conduct of Miller and the government informer were admitted against petitioner, over his objection, and in reversing as to Miller and ordering his acquittal the Court of Appeals held the record to be devoid of any evidence of concerted action between him and petitioner, was it a denial of due process to condone the admission of such hearsay and affirm petitioner's conviction.

2. Where an undercover agent of the government was the sole witness to the transactions between petitioner and himself and those transactions suggested the possibility of entrapment and petitioner has ordered and paid for a transcript of the witness' testimony and it was obvious that no delay or inconvenience would be occasioned thereby was it a denial of due process to refuse petitioner the right to reserve further cross-examination of such witness until he had an opportunity to examine such transcript so as to more effectively cross-examine.

3. Where the government sells property for which there is an existing market value to petitioner on bid, and award for less than $100.00 on the day of its theft is it a denial of due process to convict him of theft of like amount of identical property of a value of more than $100.00 where (a) the indictment does not disclose whether the government will rely on market value or acquisition cost; (b) where the opinion acknowledges that the market value of each of the 80 items of theft was 70 cents and the acquisition cost aggregated $10,400.00.

4. Does concurrency of sentence bar a reversal of another count or counts of a multiple conviction even though a conviction of one count is affirmed.

D.
CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED.

United States Constitution, Amendment V:

"No person shall be . . . deprived of life, liberty or property without due process of law."

United States Constitution, Amendment VI:

"In all criminal proceedings, the accused shall enjoy the right . . . to have the assistance of counsel for his defence."

18 U. S. C. 201:

"Whoever promises, offers, or gives any money or thing of value, or makes or tenders any check, order, contract, undertaking, obligation, gratuity, or security for the payment of money or for the delivery or conveyance of anything of value, to any officer or employee or person acting for or on behalf of the United States, or any department or agency thereof, in any official function, under or by authority of any such department or agency, or to any officer or person acting for or on behalf of either House of Congress, or of any committee of either House, or both Houses thereof, with intent to influence his decision or action on any question, matter, cause, or proceeding which may at any time be pending, or which may by law be brought before him in his official capacity, or in his place of trust or profit, or with intent to influence him to commit or aid in committing, or to collude in, or allow, any fraud, or make opportu-

nity for the commission of any fraud, on the United States, or to induce him to do or omit to do any act in violation of his lawful duty, shall be fined not more than three times the amount of such money or value of such thing or imprisoned not more than three years, or both.

"This section shall not apply to violations of section 212 of this title."

18 U. S. C. 641:

"Whoever embezzles, steals, purloins, or knowingly converts to his use or the use of another, or without authority, sells, conveys or disposes of any record, voucher, money, or thing of value of the United States or of any department or agency thereof, or any property made or being made under contract for the United States or any department or agency thereof; or

"Whoever receives, conceals, or retains the same with intent to convert it to his use or gain, knowing it to have been embezzled, stolen, purloined or converted—

"Shall be fined not more than $10,000 or imprisoned not more than ten years, or both; but if the value of such property does not exceed the sum of $100, he shall be fined not more than $1,000 or imprisoned not more than one year, or both.

"The word 'value' means face, par, or market value, or cost price, either wholesale or retail, whichever is greater."

E.

STATEMENT OF THE CASE.

As noted, the case was tried to the judge without a jury.

The indictment, filed January 30, 1959 [Vol. I, p. 14], was in 19 counts. [Vol. I, pp. 1-13.]

In Count 1, petitioner and Oren C. Miller, his co-appellant, and five other persons were charged with a conspiracy to steal government property located at McClellan Air Force Base, Sacramento, California. This count averred as an overt act that petitioner on January 2, 1959 handed Anthony B. Rose a sum of money [Vol. I, p. 3, lines 7-9], and as another overt act that on December 15, 1958 his co-appellant Miller handed said Rose $5.00. [Vol. I, p. 3, lines 10-11.]

In Count 9, petitioner and his co-appellant were jointly charged with theft at said Air Force Base of eighty gyro horizon flight type indicators and other aircraft instruments of a value of more than $100.00. [Vol. I, p. 7, lines 8-16]; in Count 10, petitioner was charged with giving on or about December 30, 1958 the sum of $150.00 to Anthony B. Rose, an employee of the Air Force at said Air Force Base, to allow unauthorized removal of government property from said Air Force Base [Vol. I, p. 7, line 18, to p. 8, line 7]; in Count 11, that petitioner on January 2, 1959 gave $300.0 to said Rose to allow unauthorized removal of government property from said Air Force Base [Vol. I, p. 8, lines 10-23]; in Count 12, that the co-appellant Miller on December 30, 1958 committed the same kind of offense at the same place with the same government employee for the same purpose. [Vol. I, p. 9, lines 1-15.]

Except petitioner and his co-appellant Miller, all the defendants entered pleas of guilty to one or more counts similar to those charged against petitioner, obtained dismissals of the other counts naming them and were given probation under conditions ranging from 40 to 90 days in jail with fines of $300.00 to $1,000.00. [Vol. I, pp. 94-109.]

Petitioner and his co-appellant Miller were found guilty on Count 9 (theft), petitioner on Counts 10 (bribery) and 11 (bribery) and co-appellant Miller on Count 12 (bribery) [Vol. I, p. 42, lines 6-21], a judgment of acquittal being entered on Count 1 for both of them at the end of plaintiff's case. [Vol. II, p. 166, lines 9-15.]

Petitioner was sentenced on Count 9 to three years and a $10,000 fine [Vol. II, p. 305, lines 1-10], later, corrected to $5,000 [Vol. II, p. 312, lines 5-8], on Count 10 to three years and no fine, on Count 11 to three years and no fine with the sentences on all three counts to be served concurrently and probation denied. [Vol. II, p. 304, line 24, to p. 306, line 2.]

Co-appellant Miller was sentenced on Count 9 to three years and a fine of $1,000 and on Count 12 to three years to be served concurrently, execution of said sentences suspended, and probation granted [Vol. II, p. 306, line 25, to p. 307, line 5.]

Judgment against petitioner was affirmed. Judgment against Miller was reversed with instructions that judgment of conviction against him be set aside and judgment of acquittal entered. (Op., Vol. III, p. 6.)

The government's case against petitioner and his co-appellant on all counts was made on the testimony of

one Rose who was an undercover agent of the FBI. (Op., Vol. III, p. 3.)

While the theory of the government, embraced by the trial court, was that petitioner and his co-appellant acted in concert, the Court of Appeals held that the record was wholly devoid of evidence of such concerted action. Nevertheless a list of instruments, handed by Miller to Rose of which the Court of Appeals said that petitioner had no knowledge, was received in evidence against petitioner [Ex. 1, Vol. II, p. 138, lines 11-12] over his objection that it was hearsay [Vol. II, p. 24, lines 24-25]; and that it was without foundation, incompetent, irrelevant and immaterial and hearsay [Vol. II, p. 137, line 23, to p. 138, line 11.] The Court of Appeals disposed of this list as follows:

> "The United States relies heavily upon an exhibit which is a list of instruments copies of which were delivered by Miller to Rose and to another warehouseman at the base, with the advice that a friend of Miller's in Los Angeles would like to purchase the listed instruments at the prices set forth. The evidence is clear that the list was prepared by and presented for a different dealer than Fulks and that Fulks had no knowledge of it. Rose himself testified that Miller had so advised him. No inference of concerted action between Miller and Fulks can therefore be drawn from this list. An inference that Miller might be disposed to engage in unlawful activity of the nature of that charged is wholly insufficient to establish his guilt of the crimes upon which he has been indicted." (Op., Vol. III, p. 6.)

A conversation incriminating petitioner between Rose and the co-appellant, petitioner not being present [Vol.

II, p. 51, lines 21-23; p. 54, lines 1-9; p. 56, line 1, to p. 57, line 8], over petitioner's objection [Vol. II, p. 51, lines 24-25] was first limited to the co-appellant [Vol. II, p. 52, lines 1-3], then admitted against petitioner [Vol. II, p. 52, lines 7-13], petitioner reserving the right to move to strike [Vol. II, p. 52, lines 14-18], as he later did [Vol. II, p. 142, lines 8-17], with his motion being denied [Vol. II, p. 142, line 18.]

Notwithstanding this holding, the opinion then validates the reception of two kinds of critical hearsay evidence against petitioner by the trial court which decided the point against petitioner on the assumption, condemned by the Court of Appeals, that concerted action between petitioner and the co-appellant having been lawfully proved, hearsay, both documentary and oral, produced through the co-appellant's acts and words, was evidence of petitioner's guilt.

Without any grounds for suspecting petitioner of ulterior motives other than the list and activities of Miller, the informer Rose went out of his way to invite the very acts which the government now charges were culpable [Vol. II, p. 31, line 15, to p. 34, line 18.] In the face of this probability of entrapment the Court unduly restricted the cross-examination of this government witness.

The market value of the stolen property was $60.80. The cost of acquisition to the government was $16,400.00. (Op., Vol. III, p. 5.)

Petitioner's counsel asked to reserve the right of further cross-examination until the reporter could furnish a transcript of this witness' direct testimony [Vol. II, p. 92, lines 13-18] and was refused [Vol. II, p. 93, lines 1-17.]

F.

ARGUMENT AMPLIFYING THE REASONS RELIED ON FOR THE ALLOWANCE OF THE WRIT.

I.

Due Process Was Violated by the Admission of Hearsay Evidence.

a. The opinion below observes that the theory of the government was that the petitioner and his co-appellant acted in concert, and then flatly rejects this theory.

It was upon this rejected theory that the trial court admitted in evidence against petitioner as well as his co-appellant a certain list of instruments. This list (Government Exhibit 1 for identification [Vol. II, p. 26, lines 21-25]; Government Exhibit 1 in evidence [Vol. II, p. 138, lines 11-12]), of which the opinion says petitioner had no knowledge, describing certain instruments a friend of the co-appellant wanted [Vol. II, p. 66, lines 7-23] and which the government witness, Rose, intimated he was asked by the co-appellant, in petitioner's absence, to steal for a share of the spoils [Vol. II, p. 67, line 16, to p. 69, lines 22] was received in evidence [Vol. II, p. 138, lines 11-12] over petitioner's objection, subject to his motion to strike [Vol. II, p. 26, lines 7-15] which was made [Vol. II, p. 137, line 19, to p. 138, line 7] and denied [Vol. II, p. 138, line 11]. This list was hearsay (*In re Sawyer's Petition*, 229 F. 2d 805, cert. den. in *Sawyer v. Barczak*, 76 S. Ct. 1025, 351 U. S. 966, 100 L. Ed. 1486, rehearing denied.)

b. Other and perhaps the most damaging hearsay was admitted against petitioner consisting of a conversation between the government informer and the co-appellant, petitioner again not being present, which took

place a month after the dates of the alleged offenses—offered to show consciousness by petitioner of his guilt, of his wish to destroy the list because of its incriminating character, and of the intent of petitioner and the co-appellant to fabricate a defense. [Vol. II, p. 50, line 15, to p. 57, line 2.]*

The court first ruled that this conversation was received only as to the co-appellant [Vol. II, p. 52, lines 1-3], then announced it reversed itself and was admitting this conversation as to petitioner, subject to a motion to strike, as well as the co-appellant. [Vol. II, p. 52, lines 19-24.]

II.

Due Process Was Violated by the Limitation of Cross-Examination of the Only Government Witness.

The improper denial of the right of cross-examination violates due process (*Snyder v. United States*, 291 U. S. 106, 54 S. Ct. 330, 78 L. Ed. 674).

Petitioner's counsel came into court at 10:00 A.M. on March 9, 1959 expecting to argue a motion to dismiss a portion of the indictment [Vol. I, pp. 22, 23] and a motion for severance [Vol. I, p. 20] from several co-defendants with whom he had never had any connection or acquaintance [Vol. I, p. 30], that counsel had in prospect a jury trial [Vol. I, p. 23, lines 21-22] with the probability of considerable time being spent in the selection of a jury and the preliminaries incident to such

* He told us that Mr. Fiske would have come up but he was kind of afraid to." [Vol. II, p. 54, lines 3, 4.]

And: "He said that Mr. Fiske was going to deny everything." [Vol. II, p. 56, line 20.]

a trial. Petitioner's counsel discovered that his motion to sever had been made moot by pleas of guilty on the part of the co-defendants entered shortly before the trial date. Disappointingly there was no hiatus, as expected, no breathing spell affording an opportunity for counsel to get his feet on the ground.

The proceedings moved apace and at 9:30 A.M.—one-half hour before the time noticed—the motions were heard, disposed of and the taking of evidence began at 11:00 A.M. Forty-three pages of direct testimony and fourteen exhibits were marked and discussed and 34 pages of cross-examination took place between 11:00 A.M. and the afternoon recess. [Vol. II, pp. 3-10.]

Following the recess petitioner's counsel informed the Court he had ordered a copy of the informer's testimony thus far and asked to reserve the right to further cross-examine him after an opportunity to analyze the transcript. Under the circumstances set forth and in view of the importance of the testimony, solely upon the verity and cogency of which depended the guilt or innocence of two defendants on one count of conspiracy and five substantive crimes (as the record then stood), this request was reasonable. Whether its refusal was reasonable can best be determined by the reason given by the trial court therefor:

> The Court: . . . It certainly is not going to help you much to read what has taken place, because he has been asked and has answered everything that has happened here in about 15 minutes." [Vol. II, p. 93, lines 4-7.]

The court's reason as assigned (and there is no other apparent from the record) was either correct and reasonable or it was not. If it was not, then since the request was reasonable, its denial was unreasonable and petitioner was deprived of this important right in violation of due process of law as guaranteed by the 14th Amendment to the Constitution of the United States.

In *Fisher v. United States* (9 Cir.), 231 F. 2d 99, there was a reversal for undue restriction and the Court referred to *United States v. Augustine*, 189 F. 2d 587.

Augustine, supra, points up several factors determinative of the proper use of the Court's discretion in this matter. Thus we find such language as:

> "His credibility was a critical point for the defendant's case. . . . It is possible had the inquiry been permitted to widen out that some of this witness's testimony could have been shaken. If it could be defendant was entitled to shake it. If this were a collateral point, extended cross-examination would not have been so important. But the heart of the case, etc."

Here the witness was more than the heart of the government's case—he *was* the government case. Since there was nothing indicating that the progress of the trial might have been slowed, or that this government employed, local witness would have been inconvenienced, or that the cross-examination had already been unduly extended (43 pages of direct to 33 pages of cross), and because the possibility of entrapment was clearly pres-

ent in this case, the widest latitude should have been allowed.

Lunceford v. United States, 200 F. 2d 237.

Volumn II, pages 87-92, relates the witness's *interpretation* of Fulks' conversation as to what was to be done for the $300.00 involved in one of the bribery counts. In the next breath we are assured, not once but twice, that there had been no previous mention of $300.00. Time after time when counsel sought to have the witness tell what was *said* the question elicited only the witness's construction of what was said. This ancient and irritating area was never penetrated and petitioner's counsel never was successful in getting *what was said* from the witness, notwithstanding the Court felt that "it has been answered several times." [Vol. II, p. 88, lines 6-7.]

We come now to the final and, we submit, the most important and clear-cut instance of undue restriction of the constitutional right to cross-examine.

Miller's actions have now, in effect, been found not only to be innocent but have been found to have had no binding effect upon petitioner. Precisely for the same reasons, Rose had no right, because of any prior acts of Miller, to have suspected petitioner. Yet we do find this government witness, who had a prior arrangement looking to the apprehension of those disposed to pilfer from the base, facilitating petitioner in activity easily construed as guilty.

On this point the most eloquent and persuasive aspect of this case is found in the following statement of Rose:

> "We continued with the loading and we finally got back to the instruments again, *and I asked Mr. Fulks* which ones he wanted . . ." (Emphasis added.) [Vol. II, p. 33, lines 17-19.]

Up to this moment nothing had transpired which by any stretch of the imagination could have formed the basis of a criminal charge. True, petitioner had given Rose $50.00, but it was without strings. Petitioner had seen some instruments which he said he thought were his and upon that fact being disputed by Rose, petitioner dropped the subject. If then Rose became the moving party, without the factors justifying his activity being present, the defense of entrapment would have been available to petitioner. This was not a collateral or incidental matter—this was critical and the very "heart of the case." And the following was a proper and important question, addressed to Rose, dealing with his objectives in his relations with petitioner in connection with the $300.00 bribe when not a word had been said about money but he had nevertheless stripped his pockets to make room for any money which he might procure:

> "Q. So you understood that your object that day, in part at least, was to get some money from Mr. Fulks, wasn't it?
>
> Mr. Woodward: I object to that. That is an unfair question.
>
> The Court: The objection is sustained." [Vol. II, p. 90, line 22, to p. 91, line 1.]

III.

The Court of Appeals Construction of "Value" as Used in 18 U. S. C., Section 641, Decides an Important Question of Federal Law Which Has Not Been but Should Be Settled by This Court.

The statute to be here applied, 18 U. S. C. Section 641, provides:

> "The word 'value' means face, par, or market value, or cost price, either wholesale or retail, whichever is greater."

As the opinion says, the property to which the definition is to be applied is 80 gyro horizon indicators, said in the indictment, again according to the opinion, to be "of a value of more than $100.00".

The opinion states there is evidence that the gyro-horizon indicators had a cost price to the United States at the time of acquisition of $205.00 each.

Hence the property is marked by the evidence, dollar-wise, at $16,400.00 or $80.80. If the former, then under the cited statute the maximum penalty is a fine of $10,000.00 and ten years imprisonment. If the latter, the maximum penalty is one year and $1,000.00.

The key words to be construed then are "cost price". There is another statutory definition of value in the same title. Thus 18 U. S. C. 2311 defines value as "face, par or market value, whichever is the greatest". This section is found in Chapter 113, dealing with offenses involving non-government property while 18 U. S. C. 641, the statute here applied, is placed in Chapter 31, dealing with offenses involving government owned property.

The only difference between the two cited statutes on the point here argued is that Section 2311 does not contain the phrase "or cost price, either wholesale or retail whichever is greater".

The two cited laws ought to be read together, petitioner submits, thereby attaining a complete statutory scheme to fix the degrees of punishments for thefts of government-owned property and non-government owned property.

Section 641 must be read to say, petitioner submits, that the degree of punishment is to be fixed by the market value, if any, at the time and place of the theft and, if none, then the cost price paid by the government.

This construction of this section amounts to a codification of the decisional law by the Congress. The decisional law thus codified is principally found in cases dealing with 18 U. S. C. Sections 641, 659 and 2311.

The substance of these decisions is that where there is no market value at the time and place of the theft that the test is the cost to the owner of the stolen property. The corollary necessarily flowing from this proposition is that the prosecution must first prove that the stolen property had no market value at the place and time of the theft and then, and only then, it will be allowed to prove the price the government paid for it. But here the evidence showed that there was a market value at the time and place of the theft which was less than $100.00, the division line between felony and misdemeanor.

Little more than a year ago the same Court held in an indictment under 18 U. S. C. Section 659, dealing

with theft and possession of non-government owned property that 18 U. S. C. 641 was the criterion (*Torres v. United States*, 270 F. 2d 252, 256, cert. den. March 21, 1960, 4 L. Ed. 2d 741), rejecting the contention that 18 U. S. C. 2311 supplied the standard.*

This was so, *Torres* said, for two reasons, viz., (1) Section 2311 by its terms is applicable only to Chapter 113, in which it is placed; and (2) Section 641 is found in the same chapter as the section, No. 659, on which the *Torres* indictment was laid.

The government claims that it made its case of a values of more than $100.00 by proof of "unit acquisition cost". The statute contains no such term. Did the Congress clearly intend to say, as the opinion here asserts, that where the government paid $16,400.00 for the property stolen from it at a time when it was selling this same property for $60.80, the culprit was to be punished by a fine of $10,000.00 and ten years imprisonment?

Speaking of cost, it has been said that:

> ". . . the word is one of variable meaning 'capable of a larger or narrower construction according to the subject matter and the circumstances of

---

*On this subject the Solicitor General in his brief in opposition to the petition for certiorari, page 2, footnote 1, took this position:

> "We doubt that the definition in either 18 U.S.C. 2311 or 18 U.S.C. 641 which the court of appeals cited is applicable as a 'specific statutory definition.' Section 2311 states that the definition applies as 'used in this chapter' and the chapter does not include Section 659. On the other hand, the definition in Section 641, seems to apply to public property, the taking of which is prohibited by that statute. Under the circumstances, the statutory definitions are only a guide to what Congress meant by the term value in Section 659."

the particular case. It is sometimes used to express the value of a thing and sometimes the price paid for it.' (14A. C. J. 1433; and see 20 C. J. S. 241.) Indeed, it has been said: 'Even in the simpler application to mere bargain and sale of a thing already in existence, and not to be manufactured, the term ("cost") is ambiguous, and so much so that it is not impossible that often it will be found to avoid the contract for incurable uncertainty . . .' (*Hazelton Tripod-Boiler Co. v. Citizens' St. Ry. Co.*, 72 F. 317, 321)."

Singer v. Ind. Management Corp., 116 Cal. App. 2d 85, 93, 94.

Market value on the other hand is a classic term and one of settled meaning in the law.

Section 641 covers two kinds of property, *i.e.*, (1) property owned by the government at the time of the theft; (2) property made or being made under contract for the government.

In *Morrissette v. United States*, 342 U. S. 246, 96 L. Ed. 288, 72 S. Ct. 240, reversing (6 Cir., 1951), 187 F. 2d 427, the defendant carried away from government property three tons of used bomb casings which he sold for $84.00. He was charged with theft under the same statute as here, Section 641, of property of the value of $84.00, the price which he got, as noted, for the used bomb casings. It is no stretch of judicial notice to assume that three tons of bomb casings loaded to fire would be worth more than $100.00. Here the government selected market value, not cost of acquisition.

Abbott v. United States (5 Cir., 1956), 239 F. 2d 310, dealt with Title 18, Section 2311 on the subject of value in reversing a conviction on a charge of interstate transportation of a stolen geophysical map, belonging to an oil company, alleged to have a value of more than $5,000.00, the minimum to make the offense cognizable by 18 U. S. C. 2314. The definition of value in Section 641 is, as already observed, the same as in Section 2311, except that the former includes the phrase "cost price" which the latter omits. The government in the cited case proved that the map cost its owner from fifty thousand to two hundred thousand dollars for the geophysical exploratory work thus depicted or such price would be its value to oil lease traders in the mapped area. But the court in reversing the conviction on this count rejected this evidence, saying at page 313:

> "Congress plainly restricted value to three well-understood standards. Mere cost of production, cost of replacement, value to the owner, value to one who might have use of it under certain special circumstances, whatever else it might be, is not market value. For that value—market—depends on a market, whether formal or informal, in which willing buyers bargain with willing sellers.
>
> "Plain language of the Congressional Act makes unnecessary, if not proscribed, a rationalization of the legislative precision in fixing the *kind* of values. But it is not lacking. The very requirement of a $5,000.00 value points towards a Congressional purpose carefully to limit the Federal sanction in theft of non-ambulatory things to those having a substantial worth. To have prescribed

actual or intrinsic value as a test would have but multiplied uncertainties in which worth would, or might be, fixed by undulating elusive factors of which personal sentimental attachment, collateral cost of production, unique value to a particular person are but typical."

Stern v. United States (6 Cir., 1953), 204 F. 2d 647, is also concerned with value under the same statute, then known as Section 415, as in *Abbott, supra*. It held that market value at the time and place of taking is the true standard of value within the meaning of the statute, if the stolen goods have a market value at such time and place. If there is no such market value, then their actual value should be shown in other ways. Actual value, *Stern* says, is not necessarily the same as original cost as economic conditions affecting value may have materially changed since the article was purchased. Where there is no market value, according to the same case, replacement value less depreciation or deterioration in value, if any, that occurred during the time the property was owned by the owner prior to the theft is to be used. In determining replacement value, original cost, the period of time owned before the theft, the amount of use to which the property was subjected by the owner, the physical condition when stolen and any other circumstances affecting their actual value are the controlling factors.

In *Gordon v. United States* (6 Cir., 1947), 164 F. 2d 855, value of non-government property was proved by the price paid by the ultimate consumer.

The value of the stolen articles, again non-government property, in *United States v. Garvey* (2 Cir.,

1945), 150 F. 2d 767, was fixed by the prices listed on the manufacturer's invoice to his retailer customer plus expert testimony that they were reasonably worth these amounts. *United States v. Crawford* (3 Cir., 1952), 195 F. 2d 472, held that value was shown by the shipper's invoice and the testimony that the defendant placed a value on the property of more than $100.00.

Husten v. United States (8 Cir., 1938), 95 F. 2d 168, dealt with jewelry samples used in selling to the retail trade and said that value at the time and place of taking, if it has a market value was the test and, more specifically, in the circumstances of that case that retail market value should prevail over wholesale or replacement value. A dissent urges that the rule in damage actions should be the test which required the wholesale value to be used.

Kowalchuck v. United States (6 Cir., 1949), 176 F. 2d 873, followed *Gordon, supra* and *Husten, supra* in approving retail prices as market value for automobile parts.

In *O'Malley v. United States* (1 Cir., 1955), 227 F. 2d 332, the indictment charged theft of government property, "the cost of which to the . . . United States was in excess of One Hundred Dollars ($100.00)." In the case at bar there was no such allegation in the indictment, it simply being averred that the value was more than $100.00. The defendant in *O'Malley, supra*, sold this property for less than $100.00, which, the opinion says, "may have been its fair market value at the time of such sale." His felony conviction was affirmed in the face of his contention that Amendment VIII of the Federal Constitution prohibiting "exces-

sive fines" or "cruel and unusual punishments" was violated by making the doing of an act punishable in the greater degree of larceny, depending upon the original cost rather than value at the time of the theft.

Certainly petitioner would be on the firmest ground if Section 641 contained the phrase "if any and if none then" after the words "market value". But the decisions in this area, with which it may be assumed the Congress was aware, add the needed phrase.

It is no answer petitioner submits, to say that the Congress had the power to make any theft of government property a felony, no matter how small its value. The fact is that the Congress did draw a line to separate felony from misdemeanor. Having done so, the distinction must have been intended to be meaningful.

Abbott, supra, rejected any test except the classic one of market value and pointed to the ambiguities which arose when any other test was used. The Congress, of course, undoubtedly had the power to make "cost price" the only test, *i.e.*, the price the government paid for the property stolen from it. But it did not do so. The first test was to be market value and if that test could not be applied then the "cost price" standard was to be the measure.

In *O'Malley, supra* when the indictment charged cost price this was notice to the defendant, in effect, that the government intended to prove that the property had no market value and that cost price would be the test. In the case at hand it did not do so. This was the same as saying that market value would be the test the government's case would meet.

There is a reason which would justify the Congress in its inclusion of "cost price" in the statute dealing with government owned property but not in the statute dealing with non-government owned property. There is much government personal property which is peculiar to its own needs of great or small value for which there is no lawful market, making it impossible to apply the classic definition of market value. The Congress, obviously wanted to draw a line for offenses against government property of small value and great value as it has done with respect to non-government property. The only practical line to draw would be on some kind of dollar or money basis, as it has done.

Many examples of government owned property of greater or lesser value, or cost of acquisition, peculiar to its own needs come to mind for which there can be no market value since, the government would not be a willing seller and there could be no lawful willing buyer, as for example; a coin die used by the mint, a postal stamp engraving, a treasury bond plate, etc., etc. Such an article might have cost thousands of dollars to acquire and the Congress understandably would want theft of such property of such great cost treated as a serious felony with a substantial penalty and hence adopted as a measure the monetary loss to the government. In that kind of a situation the property, as a matter of law, would have and could have no market value and consequently cost of acquisition would be the yard stick.

Some meaning and effect must be ascribed and given to the words "market value" in the statute which also mentions disjunctively cost price as another factor.

If the government view is to be upheld on this point, it is to say that the Congress intended to give it the option of indicting as a felony or a misdemeanor the same act dealing with the same property, varying in its exercise from federal district to federal district. No such lack of uniformity ought to be screwed out of the language which thus destroys an aspiration of the lawmaker: to punish the same act with an even hand wherever it occurs. Thus, in *Morrissette, supra*, the United States attorney obtained an indictment for a misdemeanor, using as a yard stick the sale price of the property in question received by the defendant, the acquisition cost to the government being obviously much greater than the minimum. But in California a felony indictment would be returned for the same act involving the same property, if the government's view here is sustained.

If the Congress wanted this to be the situation it would have said so. This it has not done. On the other hand, if the statute cannot be read to say explicitly what appellant claims it says, there is at least ambiguity. Certainly, the statute is ambiguous at the very best. In this case, the Congress has left to the judiciary the task of imputing to Congress an undeclared will and, this being so, the ambiguity should be resolved in favor of lenity. (*Bell v. United States*, 349 U. S. 81, 75 S. Ct. 620, 99 L. Ed. 905.) As that case says, "it is a presupposition of our law to resolve doubts in the enforcement of a penal code against the imposition of a harsher punishment."

IV.

The Court of Appeals Decision Requires a Re-Examination by This Court of the Rule of Concurrency Because of Conflict With Decisions of Another Court of Appeals and the Importance of the Question.

The sentence was a fine of $5,000.00 and three years concurrently on the theft count where the maximum penalty is 10 years and $10,000.00 (Title 18 U. S. C., Sec. 641) and three years on each of the two bribery counts, with probation denied, where the maximum on each count is three years and not more than three times the amount of money or value of the thing which constituted the bribe (18 U. S. C., Sec. 201) [Vol. II, p. 304, line 24, p. 306, line 3; p. 311, line 25; p. 312, line 8.]

United States v. Hines, Cal. App. 2d 256 F. 2d 561 (1958), deals exhaustively with the proposition here urged. In *Hines* the defendant was convicted on three counts of a four count indictment and acquitted on the other count. Sentenced to three years on each count, the sentences to run concurrently, his appeal charged error only with respect to the conviction on the second count raising no claim of error with respect to the other counts on which he stood convicted and as to which his sentence ran concurrently.

Observing that appellant did not claim that his convictions on counts three and four were erroneous and that these convictions were supported by substantial evidence *Hines* notes that the idea that failure to attack the convictions on either count three or four left the court with no alternative but to affirm originated in *Claassen v. United States*, 142 U. S. 140. In *Claassen*

the defendant was convicted on five of eleven counts and the court sentenced him to six years on a general judgment which made no reference to any of the specific counts. On appeal the Supreme Court only considered the sufficiency of the first count and said it was settled law in that court, and in this country generally, that a general verdict and judgment on an indictment containing several counts cannot be reversed if any count is good thus warranting the judgment since, in the absence of anything in the record to show the contrary the presumption of law is that the court imposed the sentence on the good count only.

Hines points out that technically the situation in the *Claassen* case differed of course from the *Hines* case where the defendant was convicted of three separate crimes. The same difference exists between the *Claassen* case and that of appellant. *Hines* then concludes that it is unwarranted to entertain the *Claassen* presumption that the sentence was on the good count only, even if it is still justified in the light of contemporary circumstances. Unhappily, for a settled state of the law and long after the *Claassen* decision the Supreme Court applied the *Claassen* rule to a case where sentences were concurrent in *Pierce v. United States*, 252 U. S. 239, although refusing to do so in *Putnam v. United States*, 162 U. S. 687. However, *Pierce* has been followed a number of times still without any explanation why the *Claassen* presumption should have any effect where the defendant is convicted of different offenses and separately sentenced to terms of imprisonment on each conviction. But *Hines* says that putting aside the vagaries of these decisions, the Supreme Court has clearly held that the rule is not hard and fast but rather

a matter of discretion since on at least one occasion it reversed convictions on some counts where concurrent sentences had been imposed, citing *Putnam v. United States, supra; Robinson v. United States* (6 Cir.), 30 F. 2d 25, and *United States v. DiCanio* (2 Cir.), 245 F. 2d 718, cert. den.; *DiCanio v. United States*, 355 U. S. 874.

But even in a *Claassen* type of case where the conviction was on two counts with a sentence on a general judgment, *Ballew v. United States*, 160 U. S. 187, after exhaustively reviewing the English cases, concluded it had power to reverse one count even though conviction on the other was proper and instructed the lower court to enter judgment on the good count and to proceed on the defective count in conformity with law. *Hines*, admitting its perplexity in attempting to isolate the circumstances which lead the Supreme Court to examine all counts in some instances and only one count in others, speculated that possibly in *Putnam, supra*, and *Ballew, supra*, the Supreme Court suspected that the total sentences would be less if the convictions were shorn of the defective counts. "Obviously the *Claassen* rule", according to *Hines*, page 563, "especially as it applies to cases involving concurrent sentences presumes that a district judge does and should give the same punishment on one count convictions as he does on multi-count convictions and that a defendant's judgment is no greater so long as he must stay in prison for the same period of time."

Hines, page 563, questions the validity of this presumption, citing the 1958 decision in *Yates v. United States*, 356 U. S. 363 (9 Cir.), 252 F. 2d 568.

In its further attack on this presumption, *Hines* points out that it does not take into account "the stigma which attaches to an accused from the conviction of two or more crimes rather than one, or, the practical effect on a prisoner, now that the parole system is so widely applied." Hence *Hines* adopted the rule that it would entertain an appeal from a multi-count indictment conviction, where some counts are not attacked, "whenever the nature of the error committed below or other circumstances suggest that the accused might have received a longer sentence than otherwise would have been imposed, or that he has been prejudiced by the results of the proceedings," and thus reached the merits of the appeal on the conviction of one count even though other convictions were not attacked.

Yates, supra, after tracing the lengthy, complicated history of the Los Angeles Smith Act conspiracy prosecutions, commenced in 1951 and dismissed in 1958 by the government (350 U. S. 305), following the reversal in 354 U. S. 298, deals with a sentence of eleven one year terms to run concurrently (upon completion of five years imprisonment under Yates' conspiracy conviction, which was reversed as noted above) for eleven criminal contempts. On review holding that there was but one contempt and that a sentence for only one contempt was proper, the Supreme Court reversed ten contempt convictions, affirmed one, vacated the one year sentence for that conviction, remanded to the District Court for an appropriate new sentence, which again imposed a one year sentence affirmed by this Court in 252 F. 2d 508; in the face of the claim that this sentence was excessive, arbitrary, cruel and inhuman punishment, a denial of due process in viola-

tion of the Eighth and Fifth Amendment to the Federal Constitution (227 F. 2d 851, 853), although conceding that the District Court was severe (227 F. 2d 851, 855), a statement of which the Supreme Court significantly took note (350 U. S. 366).

Hines, it is urged, is correct in citing *Yates* as a repudiation of the presumption that in concurrent sentence cases a district judge does and should give the same punishment on one count convictions as he does no multi-count convictions and that a defendant's punishment is no greater so long as he must stay in prison for the same period of time.

What needs to be observed here in *Yates* is the plain decision that in a multi-count indictment, as *Hines* says, the rule is not ironclad which requires affirmance if the conviction on any of its counts is good. *Yates* affirmed one of eleven convictions on eleven counts. If the rule were ironclad, there the matter would have ended.

Hines (p. 563), points out that on at least one occasion the Supreme Court reversed convictions on some counts of a multi-count indictment where concurrent sentences have been imposed, citing *Putnam v. United States*, 162 U. S. 687 and referring also to *Robinson v. United States* (6 Cir.), 30 F. 2d 25 and *United States v. DiCanio* (2 Cir.), 245 F. 2d 713, cert. den.: *DiCanio v. United States*, 355 U. S. 874.

The philosophy of statutory interpretation was expressed in *Bell v. United States* (1955), 349 U. S. 81 as follows:

> "When Congress has the will it has no difficulty in expressing it—when it has the will. That is

> of defining what it desires to make the unit of prosecution and, more particularly, to make each stick in a faggot a single criminal unit. When Congress leaves to the Judiciary the task of imputing to Congress an undeclared will, the ambiguity should be resolved in favor of lenity."

The Ninth Circuit seems presently to be firmly committed to the idea that where identical concurrent sentences are imposed for convictions on two counts, the ironclad rule is that it will not concern itself with the alleged weaknesses on another count if one count is good. (*Stein v. United States* (C. A. 9, 1959), 263 F. 2d 579; *Robinson v. United States* (C. A. 9), 262 F. 2d 645; *Chin Bick Wah v. United States* (C. A. 9, 1957), 245 F. 2d 274, reiterating this stand in *Buford v. United States* (C. A. 9, 1960), 272 F. 2d 483, citing (p. 486, footnote 2) *Lazon v. United States* (1955), 355 U. S. 339, 78 S. Ct. 311, 2 L. Ed. 321), where, however, it held that since the sentence included a fine on each of two counts with two years imprisonment on each count concurrently, each count was entitled to review.

Lazon v. United States, supra, it will be recalled, is discussed by *Hines, supra*.

The Ninth Circuit, then, says the questioned rule is ironclad and is without exception while the Second Circuit doubts the validity of the rule and says that there are exceptions in any event recognized by the Supreme Court under "difficult to identify" circumstances.

When *Yates, supra*, is added the law on the point indeed becomes obscure. The public interest is clearly involved in the settlement of the point. As it now

stands, a defendant with multiple convictions is justified in prosecuting an appeal if he has merit on any count, the law being thus clouded.

Parole systems, as *Hines* points out, are now so widely applied and parole boards often, if not always, use the number of convictions, even though under one indictment or prosecution as a yardstick that the multi-count convicted defendant has a real gain to make if he can upset even one conviction. If the questions raised by *Hines* are not valid, then the multi-count convicted defendant must regard his appeal as fruitless unless he can upset all convictions if he has been sentenced to concurrent terms and the time to be served is no longer than it could have been had there been conviction on the good count alone.

On the other hand, if the law is as the Ninth Circuit now appears to see it, the multiple convicted defendant will be thus told that if his sentence is no longer than it could have been had there been a valid conviction on one count alone, it will do him no good to press for a reversal on the other counts of which he stands convicted.

Conclusion.

Wherefore petitioner prays that this petition for certiorari be granted.

DANIEL G. MARSHALL,
Attorney for Petitioner.

SAM HOUSTON ALLEN,
Of Counsel.

FILE COPY

Office-Supreme Court, U.S.
FILED
DEC 10
JAMES

IN THE

Supreme Court of the United States

October Term, 1941

No. 590

APPENDIX TO PETITION FOR WRIT OF CERTIORARI

IN THE

Supreme Court of the United States

October Term, 1960

No. .....

ALEXANDER L. FULKS,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

APPENDIX TO PETITION FOR WRIT OF CERTIORARI.

Order Directing Filing of Opinion and Filing and Recording of Judgment.

United States Court of Appeals for the Ninth Circuit.

Excerpt from Proceedings of Monday, October 10, 1960.

Before: ORR, HAMLIN and MERRILL, Circuit Judges.

Ordered that the typewritten opinion this day rendered by this Court in above cause be forthwith filed by the Clerk, and that a Judgment be filed and recorded in the minutes of the Court in accordance with the opinion rendered.

Opinion of the United States Court of Appeals for the Ninth Circuit.

Alexander L. Fulks and Oren C. Miller, Appellants, vs. United States of America, Appellee. No. 16,475. Oct. 10, 1960.

Upon Appeal from the United States District Court for the Northern District of California, Northern Division.

Before: Orr, Hamlin and Merrill, Circuit Judges.

Merrill, Circuit Judge:

This appeal is taken from judgment of conviction of the crimes of theft of government property exceeding $100.00 in value, 18 U.S.C. §641, and bribery of a government employee, 18 U.S.C. §201. The principal question presented is whether there is evidence to support findings of guilt. The case was tried to the judge without a jury.

Appellant Fulks was a Los Angeles dealer in small airplane parts. Appellant Miller was an employee of a brewing company in Los Angeles and in slack season worked as a truck driver for airplane parts dealers, including Fulks. In the latter part of 1958, Fulks, on a competitive bid, purchased from the United States a substantial quantity or airplane parts located at McLellan Air Force Base in Sacramento.

The charges against Fulks relate to two occasions on which he was present at a base warehouse while his trucks were being loaded. Rose, a warehouseman at the base, was the principal government witness. At the time of the events to which he testified, he was lend-

ing undercover assistance to the FBI in its efforts to reduce the incidence of theft at the base. There are serious conflicts between his testimony and that of Fulks, but there is no doubt that the trial judge chose to believe Rose.

He testified that during the loading of Fulks' trucks on December 30, 1958, Fulks arrived at the base and was introduced to Rose, who showed him around the warehouse. During the course of their conversation, Fulks asked Rose whether Fulks' drivers had taken care of him and Rose replied that he had received $5.00. Fulks stated that it was his practice to give his drivers $100.00 a trip for expenses, allowing $20.00 to $30.00 for the loaders to see that they loaded properly. He then gave Rose $50.00. Upon returning to the loading area, Fulks saw three stacks of boxes including a crate containing 80 gyro horizon indicators. This material was stacked across the aisle from the material which was being loaded on Fulks' truck. Fulks stated to Rose that the three stacks of boxes were his and should be included in the load. Rose stated to Fulks that they were not his; that they were not included on the list of material to be loaded. He knew that they were not Fulks' since they were on the wrong side of the aisle. Fulks said, nevertheless, he would like to have the extra material. The instruments were then loaded and during the course of the loading Fulks gave Rose an additional $100.00. These instruments constituted the material which is the subject of the theft charged in the indictment. The indictment specified:

> "80 gyro horizon flight type indicators and other aircraft instruments of a value of more than $100.00."

Other witnesses testified that by warehouse procedure material was placed on the north side of the aisle before it went on bid; that after sale the material was transferred to the south side of the aisle under lot number; that two pallets of instruments had disappeared from the north side of the aisle between the time that they had been placed there on December 30 and the time that their disappearance had been noted on January 7.

According to Rose's testimony, Rose and Fulks then conversed respecting Fulks' final truckload, which was to be picked up January 2, the following Friday. Fulks stated that he would like to have Rose do the loading. There was not enough material remaining from Fulks' purchase to constitute a full truckload and Fulks expressed his wish that extra material be added: specifically, four stacks of boxes, constituting eight to twelve crates, each containing 40 gyro horizon indicators.

On January 2, Fulks returned with the truck and renewed his request for the extra material. Rose said he would see what could be done, and Fulks then paid him $300.00. Later, Rose told Fulks that it would not be possible to add the extra material, but persuaded Fulks to let him keep the $300.00.

From this testimony, we are satisfied that there is ample evidence to support the findings of both theft and bribery as against Fulks and that those findings cannot be held to be clearly erroneous.

Fulks challenges the sufficiency of the evidence of value to warrant his conviction of theft of property exceeding $100.00 in value. 18 U.S.C. §641 provides:

> "The word 'value' means face, par, or market value, or cost price, either wholesale or retail whichever is greater."

There is evidence that the gyro horizon indicators had a cost price to the United States at the time of acquisition of $205.00 each. It is therefore clear that value has been sufficiently proved.

Fulks protests that the value at the time of theft, as established by his bid and purchase price, was 76 cents an instrument; that §641 should not be strictly applied in such a case. We must reject this contention. The language of the section is explicit and the congressional intent is clear.

Fulks challenges the sufficiency of the evidence on the bribery count to establish that Rose was a government employee under 18 U.S.C. §201. The evidence is that he was employed as a warehouseman at a United States air force base. The inference that he was in government employment is clearly available.

Other error is assigned by Fulks, all of which has been considered. We find no merit in any such assignment.

We conclude that the evidence supports the judgment of conviction against Fulks and that judgment should be affirmed.

As to appellant Miller, the government charges no theft or bribery other than those charged against Fulks. The theory of the government is that on these occasions the two defendants acted in concert. The record is

wholly devoid of evidence of concerted action other than through establishing the fact that Miller was employed by Fulks.

The United States relies heavily upon an exhibit which is a list of instruments copies of which were delivered by Miller to Rose and to another warehouseman at the base, with the advice that a friend of Miller's in Los Angeles would like to purchase the listed instruments at the prices set forth. The evidence is clear that the list was prepared by and presented for a different dealer than Fulks and that Fulks had no knowledge of it. Rose himself testified that Miller had so advised him. No inference of concerted action between Miller and Fulks can therefore be drawn from this list. An inference that Miller might be disposed to engage in unlawful activity of the nature of that charged is wholly insufficient to establish his guilt of the crimes upon which he has been indicted.

We conclude that there is no evidence to support Miller's conviction of either theft or bribery; that a finding of guilt under the circumstances was clearly erroneous.

Judgment against appellant Fulks is affirmed.

Judgment against appellant Miller is reversed. The case is remanded with instructions that judgment of conviction against Miller be set aside and judgment of acquittal entered.

(Endorsed) Opinion Filed Oct. 10, 1960.

Frank H. Schmid, Clerk.

United States Court of Appeals for the Ninth Circuit.

Alexander L. Fulks and Oren C. Miller, Appellants, vs. United States of America, Appellee. No. 16475.

Judgment.

Appeal from the United States District Court for the Northern District of California, Northern Division.

This cause came on to be heard on the Transcript of the Record from the United States District Court for the Northern District of California, Northern Division, and was duly submitted.

On consideration whereof, it is now here ordered and adjudged by this Court, that the Judgment of the said District Court against appellant Fulks, be, and hereby is affirmed, and that the Judgment of the said District Court against appellant Miller, be, and hereby is reversed, and that this cause be, and hereby is remanded to the said District Court with instructions that judgment of conviction against appellant Miller be set aside and judgment of acquittal entered.

(Endorsed) Judgment.

Filed and entered: October 10, 1960.

Frank H. Schmid, Clerk.

United States Court of Appeals for the Ninth Circuit Excerpt from Proceedings of Monday, November 21, 1960 Before: Orr, Hamlin and Merrill, Circuit Judges.

Order Denying Petition for Rehearing.

On consideration thereof, and by direction of the Court, It Is Ordered that the petition of Appellant Fulks, filed November 9, 1960, and within time allowed therefor by Rule of Court for a rehearing of the above cause, be, and hereby is denied.

DANIEL G. MARSHALL,
Attorney for Petitioner.

SAM HOUSTON ALLEN,
Of Counsel.

E COPY

Office Supreme Court, U.S.
FILED
JAN 16 1961
JAMES R. BROWNING, Clerk

No. 590

In the Supreme Court of the United States

OCTOBER TERM, 1960

ALEXANDER L. FULKS, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

J. LEE RANKIN,
Solicitor General,
MALCOLM RICHARD WILKEY,
Assistant Attorney General,
BEATRICE ROSENBERG,
PATRICIA R. HARRIS,
Attorneys,
Department of Justice, Washington 25, D.C.

INDEX

	Page
Opinion below	1
Jurisdiction	1
Questions presented	1
Statute involved	2
Statement	3
Argument	6
Conclusion	8

CITATIONS

Cases:	
Bianchi v. *United States*, 219 F. 2d 182, certiorari denied, 349 U.S. 915	7
O'Malley v. *United States*, 227 F. 2d 332, certiorari denied, 350 U.S. 966	7
Poliafico v. *United States*, 237 F. 2d 97, certiorari denied, 352 U.S. 1025	7
Statutes:	
18 U.S.C. 201	3
18 U.S.C. 371	3
18 U.S.C. 641	2, 3, 7
18 U.S.C. 2311	7

580129—61

In the Supreme Court of the United States

OCTOBER TERM, 1960

No. 590

ALEXANDER L. FULKS, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet App. 1–7) is reported at 283 F. 2d 259.

JURISDICTION

The judgment of the court of appeals was entered on October 10, 1960. A petition for rehearing was denied on November 21, 1960. The petition for a writ of certiorari was filed on December 19, 1960. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether petitioner was prejudiced, in a trial without a jury, by the ruling of the trial judge admitting against petitioner certain testimony as to

transactions between petitioner's codefendant and a government witness.

2. Whether petitioner was deprived of a fair trial because of the denial of his request for delay in cross-examining a government witness.

3. Whether the value of stolen government property was properly determined on the basis of cost to the Government.

STATUTE INVOLVED

18 U.S.C. 641 provides:

> Whoever embezzles, steals, purloins, or knowingly converts to his use or the use of another, or without authority, sells, conveys or disposes of any record, voucher, money, or thing of value of the United States or of any department or agency thereof, or any property made or being made under contract for the United States or any department or agency thereof; or
>
> Whoever receives, conceals, or retains the same with intent to convert it to his use or gain, knowing it to have been embezzled, stolen, purloined or converted—
>
> Shall be fined not more than $10,000 or imprisoned not more than ten years, or both; but if the value of such property does not exceed the sum of $100, he shall be fined not more than $1,000 or imprisoned not more than one year, or both.
>
> The word "value" means face, par, or market value, or cost price, either wholesale or retail, whichever is greater.

STATEMENT

Petitioner and one Oren Miller were charged in five counts of a nineteen-count indictment[1] returned in the United States District Court for the Northern District of California with bribery of an employee of the Air Force, in violation of 18 U.S.C. 201; theft of property of the United States valued at more than one hundred dollars, in violation of 18 U.S.C. 641; and conspiracy to commit these acts, in violation of 18 U.S.C. 371 (1 R. 1–3, 7–9). The case was tried by the court without a jury.

The pertinent facts are as follows:

1. Petitioner, a dealer in small airplane parts in Los Angeles, California (Pet. App. 2; 2 R. 247), purchased the major portion of the instruments for his business from United States Government sources, among them the McClellan Air Force Base at Sacramento, California (2 R. 247–248, 274–275). During a visit to the Base on December 30, 1958, petitioner paid Anthony Rose, a warehouseman employed there, one hundred and fifty dollars to induce him to add to a load of instruments petitioner had purchased two pallets of instruments which he had not purchased (2 R. 31–36, 259, 263–264). On January 2, 1959, petitioner returned to the base with Miller (who was employed by petitioner as a part-time truck driver) and gave Rose an additional three hundred dollars for four pallets of instruments (2 R. 37–39, 271–272).

[1] Five other persons also named in the indictment pleaded guilty (1 R. 64, 94–100).

Rose was unable to load these pallets on petitioner's truck, but petitioner took two small packages of instruments (2 R. 39, 42). The unit cost of the instruments taken by petitioner ranged from $182 to $205 (2 R. 147–150). Rose reported these events to the Base Provost Officer and the F.B.I., and turned the money over to them (2 R. 35–36, 40–41). When petitioner was questioned by agents of the F.B.I., he denied that he had given money to any employee of the McClellan Air Base (2 R. 272–274).

At the trial, petitioner testified that he had encountered some difficulty in having his trucks loaded at the McClellan Base warehouse and that there had been shortages in shipments of previous purchases (2 R. 252–257). He said that he believed that the instruments he was charged with stealing were instruments which had been left off prior loads, and that he took them because he thought he was entitled to them (2 R. 260–261). He asserted that Rose had solicited the one hundred and fifty dollar bribe, and that he had paid it to insure that his trucks would be properly loaded (2 R. 257–259, 263–264). He also claimed that Rose had threatened to inform his competitors about the arrangements under which petitioner had made large purchases from the base, and that he had given Rose the three hundred dollars to avoid trouble (2 R. 268–272).

2. Early in the trial, Rose testified that, on December 15 (*i.e.*, before petitioner's first payment to Rose), Miller had told him that he wanted some parts for a friend in Southern California (not petitioner), and that Miller had submitted, through one of petitioner's

drivers, a list of the parts he wanted (2 R. 18, 25–26). Petitioner's objection to the admission of this list against him was overruled (2 R. 137–138).

Rose also testified that, in a meeting with Miller at a bar in Sacramento, Miller had expressed apprehension about an investigation involving the list of instruments. In the course of that conversation, Miller told Rose that petitioner had said he would deny everything (2 R. 54–56). Petitioner's motion to strike this conversation, as it related to him, was denied (2 R. 142).

3. The trial judge acquitted both defendants on the conspiracy count, finding that the evidence showed a sequence of events, but not a general plan (2 R. 165–166). He found both petitioner and Miller guilty on count 9 (charging theft of 80 gyro indicators), Miller guilty on count 12 (bribery of Rose), and petitioner guilty also on counts 10 and 11 (charging delivery of $150 and $300 to Rose) (1 R. 7–9, 41–47; 2 R. 296–299). Petitioner was fined $10,000 and sentenced to serve three years on each count, the sentences to run concurrently (2 R. 304–306).

The court of appeals affirmed the conviction of petitioner, but set aside the conviction of Miller on the ground that the evidence was not sufficient to prove that he had committed the acts charged in the indictment (Pet. App. 1–7). As to Miller, the court of appeals found that Miller's presentation of the list to Rose, relating as it did to procurement of parts for a person other than petitioner, did not show Miller's implication in petitioner's bribery and theft.

ARGUMENT

1. Petitioner claims that it was prejudicial error to admit in evidence against him the testimony as to Miller's attempts to get instruments for someone other than petitioner (before the first of petitioner's payments to Rose) and the evidence of Miller's subsequent attempt to get the list destroyed (in the course of which he mentioned that petitioner intended to deny everything). The trial judge, who by his verdict indicated that he thought that Miller and petitioner were acting together, evidently considered the evidence admissible as part of the joint action by co-venturers. Assuming that, in the light of the reversal as to Miller by the court of appeals, it was error to permit this evidence to be used against petitioner, the error was harmless. The thrust of the evidence was to show that Miller was more than an innocent employee. It was not significant against petitioner. There was overwhelming evidence of petitioner's bribery of Rose and his taking of the instruments, including petitioner's own admissions that he gave the money to Rose and his attempts, inherently incredible, to put an innocent face upon those actions.

2. At the close of Rose's direct testimony, petitioner conducted an extensive cross-examination (2 R. 58–92). Petitioner then asked that he be permitted to reserve further cross-examination until he had an opportunity to examine the transcript of the testimony which Rose had just given (2 R. 92). The trial judge denied the request (2 R. 92–93). The

claim that this was error must be rejected, for certainly the question whether, under the circumstances, the completion of the cross-examination should be postponed was one peculiarly for the discretion of the trial judge. See *Poliafico* v. *United States*, 237 F. 2d 97, 111 (C.A. 6), certiorari denied, 352 U.S. 1025; *Bianchi* v. *United States*, 219 F. 2d 182, 195 (C.A. 8), certiorari denied, 349 U.S. 915.

3. Petitioner argues that 18 U.S.C. 641 should be construed as requiring that the value of stolen Government property be determined by market value, rather than by cost, unless there is no ascertainable market value (Pet. 16–25). 18 U.S.C. 641 expressly provides, however, that value is to be determined by "face, par, or market value, or cost price, either wholesale or retail, whichever is greater." The cost of the instruments petitioner stole was properly proved (2 R. 147–150). That Congress has the power to set the standard for determining value and to impose a greater penalty when the cost of the goods stolen is higher is not open to question. There is no substance to petitioner's contention that 18 U.S.C. 641 and 2311 must be construed together, for Section 2311 establishes standards for determining value where stolen *private* property is involved. Petitioner was properly indicted and convicted under 18 U.S.C. 641 which applies to theft of United States Government property. See *O'Malley* v. *United States*, 227 F. 2d 332, 336 (C.A. 1), certiorari denied, 350 U.S. 966.

CONCLUSION

The decision below is correct and the petition for a writ of certiorari should be denied.

Respectfully submitted.

J. LEE RANKIN,
Solicitor General.
MALCOLM RICHARD WILKEY,
Assistant Attorney General.
BEATRICE ROSENBERG,
PATRICIA R. HARRIS,
Attorneys.

JANUARY 1961.

U.S. GOVERNMENT PRINTING OFFICE: 1961

FILED

MAR 10

JAMES B. BROWNING, Clerk

IN THE

Supreme Court of the United States

October Term, 1940

No. 890

ALEXANDER L. FULKS,

Petitioner

vs.

UNITED STATES OF AMERICA,

Respondent.

Petition for Rehearing of Order Denying Petition for Writ of Certiorari.

DANIEL G. MARSHALL,

3041 Madison Avenue,

Los Angeles, California,

Attorney for Petitioner.

HOUSTON ALLEN,

Of Counsel.

Baker & Son, Inc., Law Printers, Los Angeles, Phone MA. 9-0271

TABLE OF AUTHORITIES CITED

CASES	PAGE
Bell v. United States, 349 U. S. 81	5
Bonetti v. Rogers, 356 U. S. 691	4
Morissette v. United States, 342 U. S. 246	3
O'Malley v. United States, 227 F. 2d 332, cert. den. 350 U. S. 966	3, 5
Smith v. United States, 360 U. S. 1	5
Torres v. United States, 270 F. 2d 252, cert. den. 4 L. Ed. 2d 741	5
United States v. Halseth, 342 U. S. 277	5

STATUTES	
United States Code, Title 18, Sec. 641	2, 3, 5
United States Code, Title 18, Sec. 659	5

IN THE

Supreme Court of the United States

October Term, 1960.
No. 590.

ALEXANDER L. FULKS,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

Petition for Rehearing of Order Denying Petition for Writ of Certiorari.

Petitioner hereby respectfully petitions for a rehearing of the order made herein February 20, 1961 denying his petition for writ of certiorari upon the following grounds:

I.

The court below said:

> "These instruments (80 gyro horizon indicators) constituted the material which is the subject of the theft charged in the indictment. The indictment specified:
>
> '80 gyro horiz n flight type indicators and other aircraft instruments of a value of more than $100.00.'" (283 F. 2d 259, 260; Pet. App. 3.)

It continued by saying:

"Fulks challenges the sufficiency of the evidence of value to warrant his conviction of theft of property exceeding $100.00 in value. 18 U. S. C. Sec. 641 provides:

'The word "value" means face, par, or market value, or cost price, either wholesale or retail, which ever is greater.'

"There is evidence that the gyro horizon indicators had a cost price to the United States at the time of acquisition of $205 each. It is therefore clear that value has been sufficiently proved.

"Fulks protests that the value at the time of theft, as established by his bid and purchase price, was 76 cents an instrument; that Sec. 641 should not be strictly applied in such a case. We must reject this contention. The language of the section is explicit and the congressional intent is clear." (283 F. 2d 259, 261; Pet. App. 5.)

That is to say, on the very date of the theft of which petitioner was convicted, he purchased from the government on his high bid a quantity of the same instruments at 76 cents each for which the government paid $205.00 each to acquire.

The reasonable market value of these 80 units was, therefore, at the time of the theft of which he stands convicted eighty times 76 cents or $60.80 while the cost of their acquisition by the government at some earlier unstated time was eighty times $205.00 or $16,400.00. The prosecution elected to establish acquisition cost as the measure of value thus making the offense punishable under 18 U. S. C. 641 by a fine of not more

than $10,000.00 or imprisonment of not more than ten years or both whereas if market value had been used as the measure the offense would have been punishable by a fine of not more than $1,000.00 or imprisonment of not more than one year or both since, as shown, the market value was only $00.80. This cannot be a rational construction of this statute, notwithstanding the holding of the court below that, "The language of the section is explicit and the congressional intent is clear." (283 F. 2d 259, 261; Pet. App. 5.) It is not reasonable to believe that the Congress intended by this language to allow the government to obtain the result shown in this decision. The Solicitor General supports the construction adopted by the Court of Appeals on the authority of *O'Malley v. United States*, 227 F. 2d 332 (C. A. 1), cert. denied, 350 U. S. 966. In *O'Malley*, however, the indictment charged with respect to the subject property in each instance that "the cost price of which to the Department of the Navy of the United States was in excess of $100.00." (227 F. 2d 332, 334.) But in the case at bar the indictment alleged that the subject of the theft was "of a value of more than $100.00."

II.

18 U. S. C. 641 concludes with this language:

> "The word 'value' means face, par, or market value, or cost price, either wholesale or retail, whichever is greater."*

But in *Morissette v. United States*, 342 U. S. 246, the government elected to indict under this statute for

*Morissette v. United States, 342 U. S. 246, 266, 267, footnote 28, relates the pertinent legislative and judicial history of 18 U. S. C. 641.

the lesser offense, alleging that the subject property was of the value of $84.00, the price for which the defendant sold the subject property, three tons of spent bomb casings. Applying the cited statute's definition of "value" the factors of "face" and "par" value are put to one side since these terms obviously refer only to currency or securities. This leaves the statutory definition to read as follows:

> "The word 'value' means . . . market value, or cost price, either wholesale or retail, whichever is greater."

If, as the court below held, "cost price" means the amount which the government paid to acquire the subject property, the phrase "either wholesale or retail" would not seem to have any significance and the statute as thus construed must be read as saying:

> "The word 'value' means . . . market value, either wholesale or retail, or cost price, whichever is greater."

A statute which can be construed to mean in the case at bar that value is the price paid by the government to acquire the subject property and in *Morissette* to mean the price for which the subject property was sold by the defendant certainly makes for serious ambiguities of the meaning of the word "value" as used in this statute. This being so doubts in the construction of a statute will be resolved against the imposition of harsher punishment. (*Bonetti v. Rogers*, 356 U. S. 691.) Moreover, when Congress in enacting a statute leaves to the judiciary the task of imputing to Congress an undeclared will, then the ambiguity should be

resolved in favor of lenity. (*Bell v. United States*, 349 U. S. 81.) The traditional canon of construction calls for the strict interpretation of criminal statutes and rules in favor of defendants where substantial rights are involved. (*Smith v. United States*, 360 U. S. 1.) Finally, penal statutes are to be construed strictly. (*United States v. Halseth*, 342 U. S. 277.)

Conclusion.

This petition ought to be granted to set at rest the meaning of the word "value" as used in this statute which has been given, as noted, different meanings. It is enshrouded in the same doubt and ambiguity as the companion statute, 18 U. S. C. 659. The court below in *Torres v. United States*, 270 F. 2d 252, cert. denied March 21, 1960, 4 L. Ed. 2d 741 applied 18 U. S. C. 641 to non government property, a view not supported by the Solicitor General in that case (see petition for writ of certiorari herein, p. 18). In *Torres*, the measure of value adopted was the reasonable market value of the subject property, not its cost of acquisition by the owner.

Finally, if the definition of value used by the court below here is to be adopted, this construction should be approved only where the indictment alleges that acquisition costs will be the standard, as alleged in *O'Malley, supra*, but not in the case at bar.

Respectfully submitted.

DANIEL G. MARSHALL,
Attorney for Petitioner.

SAM HOUSTON ALLEN,
Of Counsel.

Certificate of Counsel Under Rule 58(2), Rules of the Supreme Court.

The undersigned counsel hereby certifies that the foregoing petition for rehearing is presented in good faith and not for delay and is restricted to the grounds specified for a petition for rehearing in Rule 58(2), Rules of the Supreme Court.

DANIEL G. MARSHALL,
Attorney for Petitioner.